

Issues: Group II Written Notice with Suspension (disruptive behavior and failure to follow policy), and Group II Written Notice with Termination (workplace harassment and falsifying records); Hearing Date: 07/17/14; Decision Issued: 08/25/14; Agency: DBVI; AHO: Ternon Galloway Lee, Esq.; Case No. 10385; Outcome: Partial Relief; **Attorney's Fee Addendum issued 09/22/14 awarding \$2,401.23.**

DECISION OF HEARING OFFICER

In the matter of

Case Number: 10385

Hearing Date: July 17, 2014

Supplemental Hearing Date: August 5, 2014

Decision Issued: August 25, 2014

SUMMARY OF DECISION

The Agency had found that on an ongoing basis with the most recent occurrence being April 8, 2014, Grievant engaged in disruptive behavior and failed to follow Agency policy. It then issued Grievant a Group II Written Notice on May 12, 2014, with a suspension. Additionally, the Agency determined that, on an ongoing basis with the most recent occurrence being April 8, 2014, Grievant engaged in work place harassment and falsified reports. The Hearing Officer found the Grievant engaged in disrespectful behavior and failed to follow her supervisor's instruction. The Hearing Officer then upheld the Group II Written Notice with a suspension. However, the Hearing Officer found the Agency failed to meet its burden and show Grievant falsified a report and engaged in harassing behavior. Hence, the Hearing Officer rescinded the Group II Written Notice with removal.

HISTORY

On May 12, 2014, the Agency issued Grievant two Group II Written Notices. On one of the two, the Agency asserted that Grievant was disruptive and failed to follow Agency policy. On the other group notice the Agency alleged that Grievant engaged in work place harassment and falsified records. Specifically, the Agency contended that the conduct described in the group notices was ongoing with the last occurrences happening on April 8, 2014.

On May 13, 2014, Grievant timely filed a grievance challenging the Agency's discipline. On June 4, 2014, EDR assigned the undersigned as the hearing officer to the appeals.

The Hearing Officer held a telephonic prehearing conference (PHC) on June 18, 2014.¹ Based on discussions during the PHC, the Hearing Officer found the first available date for the hearing was July 17, 2014. Accordingly, by agreement of the parties, the hearing was set for that date. On June 19, 2014, the Hearing Office issued a scheduling order addressing those matters discussed and ruled on during the PHC.

On the date of the hearing and prior to commencing it, the parties were given an opportunity to present matters of concern to the Hearing Office. At that time, counsel for Grievant objected to the Agency's exhibit 8, particularly pages 5, 6, 7, 9, 10, 11, 14, and 15 asserting that the statements contained on those pages lacked credibility. After affording the Agency's Advocate an opportunity to respond, the Hearing Officer overruled the objections and decide the weight to afford that exhibit. Then she admitted the Agency's exhibits 1 through 17.

¹ This was the parties' first date available for the PHC.

Grievant was provided an opportunity to present exhibits, but declined to do so. Moreover, the Hearing Officer inquired if the Grievant needed any accommodations for the hearing to which she replied that none were needed.

At the hearing held on July 17, 2014, both parties were given the opportunity to make opening and closing statements and to call witnesses. Each party was provided the opportunity to cross examine any witnesses presented by the opposing party.

During the proceeding, the Agency was represented by its advocate. Grievant was also represented by her advocate.²

APPEARANCES

Advocate for Agency
Witnesses for the Agency (4 witnesses)
Grievant
Witnesses for Grievant (1, Grievant)

ISSUE

Were the written notices warranted and appropriate under the circumstances?

BURDEN OF PROOF

The burden of proof is on the Agency to show by a preponderance of the evidence that its disciplinary actions against Grievant were warranted and appropriate under the circumstances. Grievance Procedure Manual (“GPM”) § 5.8(2). A preponderance of the evidence is evidence which shows that what is sought to be proved is more probable than not. GPM § 9.

FINDINGS OF FACT

After reviewing all the evidence presented and observing the demeanor of each witness who testified by telephone the Hearing Officer makes the following findings of fact:

1. Grievant is a native of Bosnia. She resided there until about age 16 when ethnic conflicts compelled her family to migrate to the United States in the 1990s. As such, English is Grievant’s second language, and she does not understand some peculiarities of the English culture and language. (Testimony of Grievant).

² As noted above, during the hearing held on July 17, 2014, Grievant was represented by an attorney. Both Grievant and her attorney stated that the attorney had been retained for the limited purpose of representing Grievant during the hearing held on July 17, 2014.

Under the GPM § 5.6, hearings must be recorded verbatim. Due to the recording of Deputy Commissioner’s July 17, 2014 testimony being inadvertently erased, the Hearing Officer held a supplemental hearing via telephone on August 5, 2014, to retake that testimony and record it. During that hearing, Grievant was unrepresented.

While residing in her homeland, Grievant experienced the horrors of the Bosnia War and post war atrocities. They included, but are not limited to, Grievant running to take shelter from bombs, being seated next to her mother while a gun was pointed at her mother's head, and being separated from family while fleeing the country. Grievant reports suffering great anxiety and Post Traumatic Stress Disorder (PTSD) due to this experience. Grievant completed three years of high school in the United States, graduating in 2002. She repeated one of her high school years. Grievant continued her education and obtained an undergraduate degree in five years, and thereafter a master's degree. (Testimony of Grievant).

2. Grievant is also blind and relies on tone of voice to interpret the meaning of spoken words. Words spoken in a harsh manner trigger anxiety. Her blindness and Bosnian experience reportedly intensifies her anxiety, including fear of safety for herself and others (including animals) around her. (Testimony of Grievant, A Exh. 1, p. 9).

3. Grievant's first job was with the Agency as a vocational rehabilitation counselor. (Testimony of Grievant; A Exhibit 1, p. 9). She was hired June 25, 2012, and as of May 2014, Supervisor had been her immediate superior for about 18 months. This is the same amount of time Supervisor had held the position of regional manager. (A Exh. 3; Testimonies of Supervisor and Grievant). At the time Grievant was hired she was a new Virginia resident. The Assistant would help her understand the meaning of words early in her employment with the Agency. Later during her employment, Grievant would refer to an application on her cellular telephone to assist her in determining the meaning of certain English words. (Testimonies of Assistant and Grievant). The mission of the Agency is to assist the blind or visually impaired to reach their desired level of education, employment, and independence. The Agency consists of six (6) regional offices. Each of these offices has a manager assigned to it. The Norfolk Regional Office's manager was Grievant's immediate supervisor. (Testimony of Deputy Commissioner).

4. Due to her new hire status, Grievant was placed on a one year probation. April 2013, Grievant emailed the Deputy Commissioner, her supervisor's boss, complaining about the management style of Grievant's supervisor. Deputy Commissioner held individual discussions with Grievant and her supervisor about the complaint. He also considered that Grievant had only about 6 weeks remaining on probationary status and then recommended the two mediate their differences. As suggested, both partook in the mediation. (Testimony of Deputy Commissioner).

5. Grievant successfully completed probationary period and on October 17, 2013 her performance evaluation rated her a "contributor." (A Exh. 4, p. 2; Testimony of Supervisor).

6. Deputy Commissioner next had interactions with Grievant in April 2014, when Grievant sent Deputy Commissioner several emails complaining about (i) Supervisor allowing family members to come to work with her and (ii) Supervisor touching Grievant without Grievant's consent. (Testimony of Deputy Commissioner; A Exh. 10, p. 1). Due to these assertions Deputy Commissioner authorized an investigation to determine what was occurring in the Norfolk Regional Office. (Testimony of Deputy Commissioner).

7. HR Manager conducted the investigation on May 6, 2014, by interviewing all but one of the employees assigned to the Norfolk Regional Office.³ At the investigation's conclusion, Deputy Commissioner, HR Manager, and Supervisor discussed its conclusion and determined Grievant had violated the standards of conduct. As detailed below, management then issued Grievant a due process notice followed by written group notices. (Testimonies of Deputy Commissioner and HR Director).

DUE PROCESS NOTICE

8. As referenced above, on May 7, 2014, the Agency issued Grievant a detailed due process notice which asserted “[y]ou have engaged in continued disruptive behavior which has created a negative work environment. This includes making false allegations against other employees. Employees are wary of trusting you because of actions that you have taken.”

Specifically the due process notice asserted Grievant engaged in the following disruptive behaviors:

(i) In November 2013, you initiated a false report against another employee regarding her guide dog to Leader Dog. In December, you admitted to the employee that you had made the call. You did so, by your admission to HR Manager, because the employee received rides and did not use the same transportation system that you did. You did not like her response so you retaliated by alleging animal abuse.

(ii) On April 8th, you e-mailed the Deputy Commissioner and accused an employee of harassing you with cat noises despite having “asked him several times, to please not do that, however he continues.” You also indicated that you had spoken with me and that I said “he’s just playing with you.” You did not indicate to me that you felt any harassment at any time by the employee. The employee and you had engaged in this behavior together and you called the other employee by your cat's name. The employee engaged in this behavior with you as you had introduced him to your cat and he was mimicking the sound to you. When the employee learned that your cat had died in late March, he ceased making these noises – this occurred prior to your complaint.

(iii) On April 8th, you placed a toy mouse in the refrigerator with crackers and cheese, and a brailled note saying it was from you. I removed this and put it on your desk explaining to you why it shouldn't be left in the refrigerator. On April 9th, other employees saw the toy mouse again placed inside the refrigerator and were uncomfortable since this was a cat toy and uncertainty arose about the sanitary implications.

(iv) On May 6th while meeting with me and the Office Manager regarding a

³ HR Manager was unable to interview one of the employees of the office because that individual was not present that day.

third necessary amendment to an authorization for Client Service, you engaged in behavior to create a negative impression of me by pulling away from the table in the conference room stating you weren't comfortable being close to me, crossing your arms across your chest, and indicating "I'm okay, I'm okay." You later announced in a loud voice in the open office area that you don't trust me.

(A Exh. 1, pp 6-7).

9. In addressing Grievant, the due process notice also stated "[y]ou have engaged in an escalating pattern of retaliation toward me, creating emotional distress as defined under the Workplace Violence policy #1.80. You have made false allegations against me including touching you as indicated previously. Regarding the retaliation offenses, the notice detailed the following:

(i) On April 22nd, you e-mailed [Deputy Commissioner] and the director of VR Programs, ..., alleging that my father-in-law made a comment to you about your accent being horrible while you were on the phone with a client. [Human Resource manager] HR manager indicated in her conversation with you, you said after you hung up the phone with the client, he made the comment. Finally, in a review of your phone calls by the Office Manager it was found that you did not place or receive any phone calls during the time period that my father-in-law was in the office. This morning you admitted to me in the presence of the HR Manager that the allegation was false.

(ii) Also on 4/22, you contacted the Director of VR Programs, [Director of VR Programs], and falsely indicated that I was angry at you and had called you stupid for asking her a question. I did have a conversation with you after I was copied on the response to your initial e-mail to ask you to check within the Norfolk Regional Office first before going to the Program Director, and it made us both look like we did not know our jobs. At no time was I angry about you contacting [VR Director] nor did I ever call you stupid. You indicated to HR Manager that I told you to send the e-mail, which makes no sense given the reaction that you claim I had with you. You claimed to HR Manager that "you were confused and say things without thinking."

(iii) You have contacted the Virginia Beach Police – Animal Control and initiated a false report against my father-in-law. You initially denied any involvement and attempted to engage me several times in regard to the complaint. You called on 4/22/14, and again on 4/24/14 and 4/25/14 although you falsely used my name in the latter two phone calls. On 4/24, you sent me an e-mail (see attached e-mail) under the guise of calling animal control on an elderly neighbor and asking if I were in your shoes, would I tell him that I did it? You emailed me on 4/29 (see attached) to let me know that you received a call from VA Beach Animal Control although you shared only a minute portion of the conversation and ask if I knew what was going on and alleging you were confused. You brought this issue up with another coworker as recently as the morning of May 6th

prior to your meeting with HR Manager. During your meeting with HR manager in the afternoon, you admitted that you made these calls in retaliation for a conversation in which I had directed you to check within our office for answers prior to going outside the office.

(A Exh. 1, pp. 7-8).

GROUP II WRITTEN NOTICES

10. After receiving Grievant's response to the due process notice and allegations of misbehavior, the Agency issued Grievant a Group II Written Notice for disruptive behavior, as well as, failure to follow instructions and policy. For these offenses, management suspended Grievant from May 13, 2014, to May 27, 2014. The notice indicated that Grievant had constantly engaged in these behaviors with the latest infraction occurring on April 8, 2014. The notice specifically described the nature of the offenses as follows:

[Grievant's] continued disruptive behavior and failure to follow instructions despite counseling that has taken place over a lengthy period of time, and the agency's referral of [Grievant] to the employee assistance program and mediation. Despite efforts of management, similar behaviors have continued in the workplace. [See Due Process Notice]

Additionally, on May 12, 2014, the Agency issued Grievant a second Group II Written Notice with removal for work place harassment and making false reports. This notice also asserted that Grievant had constantly engaged in these behaviors with the latest infraction occurring on April 8, 2014. The notice specifically described the nature of the offenses as follows:

[Grievant] has engaged in an escalating pattern of workplace harassment toward this supervisor and other employees in retaliation. This is a violation of DHRM policy 1.80. She also made false allegations to DBVT's Deputy Commissioner of Services, DBVI VR Director, and Animal Control. She admitted some of these actions to [Human Resource Manager], HR Manager. This constitutes falsification of records. [See Due Process Notice].

(A Exh. 1, pp. 3-5).

Not all of the behaviors alleged on the above-referenced May 7, 2014 due process notice, occurred by April 8, 2014, as asserted on the two group notices. (A Exh. 1, pp. 3 – 8).

BEHAVIOR ALLEGED ON THE DUE PROCESS NOTICE

11. Leader Dog Claim

Prior to Grievant's employment with the Agency, Co-worker was reported by another employee in the office for abusing her service dog. (A Exh. 14, p. 2). Fall 2013, Grievant

overheard co-worker who is also visually impaired state (in what Grievant perceived to be a harsh voice) that she was going to beat her service dog's butt. Through the course of her working at the Agency, on several occasions, Grievant had also heard this Co-worker speak to her service dog in a gruff tone. After hearing the "I am going to beat your butt" comment made by co-worker, Grievant telephoned Leader Dog⁴ reporting that Co-worker was mean to her service dog. When Grievant made the report, she was angry because her Co-worker had secured a ride to work deemed more desirable than Grievant's means of getting to work. Grievant was transported to and from work by handi-ride. (Testimonies of Grievant, Supervisor, and HR Manager). Leader Dog contacted Co-worker about the allegation and her possibly abusing the service dog. Although no abuse was found, Co-worker was upset. Co-worker did learn that Grievant made the report to Leader Dog. According to the investigative report, Co-worker states she does not trust Grievant. (A Exh. 8, p. 4).

The Agency asserts Grievant's report to Leader Dog was false. (Testimony of Supervisor, HR Manager, A Exh. 1, p. 6).

12. Claim about Cat Noises

Grievant loves cats and they provide company for her. She has rescued several cats from the SPCA. One of the Agency's drivers learned that Grievant loved cats. He had met Grievant's cats and could imitate at least one of their "meow" sounds. As such, this driver would greet Grievant by making cat noises. Grievant welcomed this greeting until she had to "put down" one of her cats. Grievant asserts she then requested the driver stop making the cat noises. He continued. She then informed her Supervisor that she no longer desired the driver to make cat noises. Grievant perceived that her Supervisor dismissed her complaint by noting that the driver was simply playing with Grievant. The cat noises from Driver continued. Thus, on April 8, 2014, Grievant, concluded that she could not obtain relief by informing her supervisor. Hence, she emailed Deputy Commissioner asking him to instruct Driver to stop making meowing noises. The noises were then stopped. (Testimonies of Grievant and Supervisor; A Exh. 1, p. 6-11; A Exh. 10, p. 1).

13. Toy Mouse Incident

Early April 2014, Grievant placed a toy mouse with what appeared to be cheese and crackers in the refrigerator at work in a zip lock bag. A note accompanied the items. After reading the note, Grievant's supervisor understood the placing of these items in the refrigerator was meant as a prank for Supervisor. Supervisor then approached Grievant with the toy mouse, reportedly laughed, and said words to the effect of "we have had our joke." The Supervisor then asked Grievant to take the mouse home and not return it to the refrigerator. Grievant was not told that anyone complained about the joke. Contrary to this instruction, either the same day or the next one, Grievant placed a toy mouse back in the refrigerator. Supervisor was made aware of this by her Assistant who saw the toy mouse again in the refrigerator. Assistant considered the prank distasteful. This was the case especially considering the toy mouse was located where food was kept and the possibility existed that a cat may have played with it. In addition,

⁴ Leader Dog is the entity Co-worker contracted with to obtain her service dog. Abusing a service dog is a violation of the contract.

Grievant had just been instructed by her Supervisor to not place the mouse in the refrigerator. (Testimonies of Supervisor, Assistant, and Grievant; A Exh. 1, p. 10).

14. May 6, 2014 Incident

On May 6, 2014, Grievant, Supervisor, and Assistant met regarding amending an authorization in a particular case. Grievant was being chastised by her supervisor for making mistakes on the authorization. This was not the first time Grievant had made such a mistake. (Testimonies of Supervisor and Assistant). Grievant is blind and relies on voice tone to get her clues. Grievant perceived Supervisor was speaking to her in an extremely harsh voice during the meeting. Grievant then backed away from the table and folded her arms. Grievant has been diagnosed with anxiety and asserts she folded her arms out of nervousness. Grievant has also been diagnosed with Post Traumatic Stress Disorder. As such, a rough tone of voice triggers symptoms of PTSD, to include fear. (Testimonies of Grievant, Supervisor, and Assistant: A Exh. 1, p. 9).

As Grievant was leaving the meeting she commented that she did not trust Supervisor. The comment was loud enough that other co-workers could hear it. Grievant admits making the comment in that environment was inappropriate. (Testimonies of Grievant and Assistant; A Exh. 1, p.10).

15. Touching

As referenced in “Finding of Fact” #1, Grievant is Bosnian and English is her second language. Due to the conflict in her native country in the 1990s, Grievant migrated to the United States. In 2002, she completed high school here. She went on to receive undergraduate and graduate degrees as well. Grievant’s first job was the one she held with the Agency as a vocational rehabilitation counselor. Her boss was Supervisor. (Testimony of Grievant).

Initially, Supervisor provided support and nurturing to Grievant. For example, a month after Grievant began her employment, she invited Grievant and her mother over for dinner. Grievant accepted the invitation . Supervisor also offered to provide grocery shopping assistance for Grievant early on when Grievant was employed. After Grievant expressed suicidal ideations in fall 2013, Supervisor offered support and stated to Grievant that if she needed someone to talk to she could talk to Supervisor. (Testimony of Grievant).

Initially during her employment with the Agency, Grievant’s supervisor and Grievant had a trusting relationship. They engaged in consensual touching to foster the support and nurturing mentioned above. The touching was not sexual in nature. It consisted of Supervisor allowing Grievant to put her head on Supervisor’s shoulder, the Supervisor touching Grievant’s shoulder or hand, the Supervisor and Grievant holding hands and hugging each other. Grievant perceived Supervisor as a mother figure because of the nurturing. Because other employees in the office began to express concerns and felt uncomfortable about the touching displayed by Supervisor and Grievant, Supervisor sought to end the touching. Hence she informed Grievant that the touching was inappropriate, their relationship must be professional only, and thus boundaries had to be established. (Testimonies of Grievant and Supervisor; A Exh. 1, p. 9).

By then, Grievant had learned to expect the touching. At some point, Grievant believed Supervisor was sending mixed messages about whether the touching remained permissible because even though Supervisor informed Grievant the touching was not appropriate, sometimes Supervisor would continue to do so or allow Grievant to touch her. For example, the touching consisted of Supervisor touching Grievant's shoulder or Grievant reaching out and touching Supervisor's hand with Supervisor's permission. Supervisor continued to touch Grievant at times and Grievant reciprocated as she needed the nurturing. (Testimonies of Grievant, Deputy Commissioner, and Supervisor; A Exh. 1, p. 9; A Exh. 9).

As time passed, Grievant established friends in the community and was not as dependent on Supervisor for support. In addition, Grievant received mixed messages from Supervisor regarding the permissibility of the touching. To end the confusion she emailed Deputy Commissioner complaining about the touching and essentially requesting he enforce the no touching. When this complaint was discussed between Supervisor and Deputy Commissioner, Supervisor asserted that she shunned Grievant's attempts to touch Supervisor. Deputy Commissioner then directed Supervisor and Grievant not to touch each other. Further, he instructed the two that when they met alone Supervisor should sit behind her desk and Grievant across from the desk. If the two were meeting where no desk was available, Deputy Commissioner instructed them to have a witness present. Supervisor's Assistant was designated as that witness. (Testimonies of Grievant, Deputy Commissioner, and Supervisor; A Exh. 1, p. 9; A Exh. 9). After the issuance of this directive, Grievant attempted to touch Supervisor once. (Testimonies of Grievant, Assistant, and Supervisor; A Exh. 1, p. 9; A Exh. 9).

16. Accent comment

Grievant also sent VR Director an email on April 22, 2014, that complained that Supervisor's father-in-law stated that Grievant has a horrible accent. In its due process notice, the Agency contends this is another false report made by Grievant.

On April 22, 2014, at the time the comment is alleged to have been made, only Grievant, Supervisor, and Supervisor's assistant remained in the office as it was near the end of the business day. Father-in-law was seated in a cubicle next to Grievant. Grievant was on her cell phone using an application to assist her in understanding a word. Grievant asserts that under his breath, father-in-law said, "lady you have a horrible accent." Assistant, who was in close proximity to Grievant, did not hear the father in law make the comment (A Exh. 12; Testimony of Assistant).

Grievant's ride arrived shortly thereafter. As she was leaving she asked the father in law if she could give him a hug before leaving. He consented and she did so. (Testimony of Assistant).

17. Payne Matter

Sometime around April 21, 2014, Grievant emailed VR Director Susan Payne about an eligibility question regarding presumed eligibility for individuals who have been found eligible

for SSI or SSDI. (A Exh. 12; A Exh. 1, p. 7). The VR Director does not work in the regional office. She also is Supervisor's superior. When the VR Director responded to the question, she copied Supervisor. Supervisor then held a conversation with Grievant and instructed Grievant to check within the regional office first to determine if the answer can be obtained in the office before going to the VR director outside the office. Supervisor also informed Grievant that by going to her superior first it appears that neither Grievant nor Supervisor knew their jobs. Grievant perceived that Supervisor was angry with Grievant for asking VR Director a question. Grievant also interpreted Supervisor's response as referring to Grievant as "stupid." (A Exh. 1, pp. 7, 10-11; A Exh. 12, p. 2; Testimony of Grievant). Grievant also interpreted Supervisor's frequent comment to Grievant that "Grievant's perspective is way off" as Supervisor referring to Grievant as being stupid. (Testimony of Grievant).

Grievant contends that Supervisor gave her permission to email the VR Director about the eligibility question. (Testimony of Grievant; A Exh. 8, p. 17).

18. Father in Law Abuse to Cat

Supervisor had mentioned to staff that she resided with her father-in-law and there was a cat in his residence. Supervisor commented in the office about her father-in-law's antics on several occasions. As an example, she had mentioned that her father in law experienced angry outbursts due to effects of a stroke he had suffered. Further, Supervisor had stated or used words to the effect that her father in law was mean and would hit the cat. And in addition, Supervisor mentioned the cat was placed in the laundry room at times. This was perceived by Grievant as a method of protecting the cat from the father in law's fury. (Testimony of Grievant; A Exh. 8, p. 16; A Exh. 1, p. 10).

Grievant was angry with Supervisor because a short time before April 22, 2014, Grievant perceived Supervisor had chastised Grievant for seeking the answer to a work related question from Supervisor's superior who was outside the regional office. Thus, on April 22, 2014, Grievant contacted the city's Animal Control department (Animal Control). Grievant made a report which Animal Control interpreted as Grievant alleging that Supervisor's elderly father in law was abusing his cat.⁵ Grievant did not identify herself and reports having a bad connection when she conversed with Animal Control on that day. (Testimony of Grievant; A Exh. 1, p. 10; A Exh. 8, pp. 16-17). Animal Control dispatched an officer to the father-in-law's residence and interviewed him on April 22, 2014. This happened to be his birthday. No validity was found in the abuse claim made on April 22, 2014. Even so, the allegation upset the father-in-law. (Testimony of Supervisor).

Grievant was not made aware of the outcome of her first call. Because she had a bad telephone connection with Animal Control, on April 22, 2014, she again made a report to Animal Control regarding abuse of the father-in-law's cat by him. Grievant placed a third call on April 25, 2014, because she perceived having a bad connection on April 24, 2014, also. During the second and third telephone calls, Grievant provided the Animal Control dispatcher with Supervisor's name and telephone number. The evidence is not sufficient to determine if

⁵ The father in law is 95 years of age and had suffered a stroke. Supervisor resides with her father in law during the weekdays. (Testimonies of Supervisor and Grievant).

Grievant represented herself as Supervisor during the latter two calls or provided Supervisor's name and telephone number as an individual to contact regarding the abuse. (Testimonies of Grievant and Supervisor; A Exh. 8, pp. 16,20).

In addition, on April 24, 2014, Grievant emailed Supervisor informing Supervisor that she had reported an elderly neighbor for abusing his cat. (Testimony of Supervisor).

April 25, 2014, was Supervisor's birthday and she was celebrating it by having a dinner party. During the celebration, Supervisor received a telephone call from Animal Control reporting that it had received two more reports alleging that Supervisor's father-in-law was abusing his cat. According to Supervisor, Animal Control informed Supervisor that because it had determined there was no abuse after the first two calls, it was not sending any one out to investigate the third report. Supervisor was concerned about these reports, the source of them, and their impact on her elderly and ill father-in-law. Thus, in an effort to prevent other such calls, she questioned Animal Control about them and was then directed to Sergeant. Sergeant agreed to investigate the matter and respond further to Supervisor. While researching the matter, Sergeant determined that the calls reporting the abuse had been made from Grievant's telephone number. Sergeant then telephoned Grievant and inquired about her placing the calls. Grievant eventually admitted to Sergeant that she had placed the calls because she was angry with Supervisor. (Testimonies of HR Manager and Supervisor; A Exh. 8, p. 16-18).

Based on Supervisor's comments about her father-in-law in the office, Grievant perceived that he was abusing the cat. Grievant did not realize the report to Animal Control may involve the police. (Testimony of Grievant; A Exh. 8, pp. 16-17).

The evidence fails to establish that Grievant had no reasonable basis to complain about suspected animal abuse by the father in law. (Testimony of Grievant; A Exh. 1, p. 10; A Exh. 8, pp. 16-17).

Grievant has great affections for cats. (Testimony of Grievant).

19. Disciplinary History

Prior to being issued the group notices on May 12, 2014, Grievant's supervisor had issued her a Group I Written Notice on February 26, 2014, for failing to follow Supervisor's instructions and causing disruptions in the workplace. (A Exh. 5, pp. 1 – 4).

Some of the behaviors for which Grievant had been issued that group notice included the following:

- (i) On October 11, 2013, in the presence of her coworkers, Grievant indicated that she was going to harm herself after receiving a performance evaluation;
- (ii) Grievant made comments in the workplace about looking for other employment as she had heard that other supervisors were nicer and more supportive of their staff;

(iii) On November 20, 2013, Grievant initially verbally refused to make corrections on errors brought to her attention for a prolonged period of time. However, she eventually made the corrections;

(iv) On November 20, 2013, Grievant stated in the proximity and hearing of other co-workers that she was going to go home and harm her pets by throwing them on the wall;

(v) On January 2014, in response to Grievant's supervisor meeting with Grievant about continued errors in her work, Grievant complained in emails about the job being stressful and stated in effect that she was looking for a less stressful job and would work under the Chesapeake Bay Bridge meeting men to make money. The email(s) also described Grievant's supervisor as "mean, moody, and spiteful."

(Testimony of Supervisor; A Exh. 5).

Before being issued the group notice in February 2014, Grievant had been counseled about her behavior and performance errors by Supervisor and Supervisor's Assistance. Also, in March 2013, Grievant had received a mandatory referral to the Employee Assistance Program (EAP) for counseling regarding what Supervisor viewed as disrespectful behavior in the workplace and Grievant bringing personal problems into the work place. (A Exh. 5; Testimony of Supervisor).

Other

While working for the Agency, Grievant and her Supervisor experienced frequent miscommunications. (Gleaned from the grievance record, to include but not limited to testimonies of Grievant, Deputy Commissioner, and Supervisor).

Additionally, due to concerns Grievant expressed to Deputy Commissioner regarding Grievant's Supervisor, Deputy Commissioner believed Grievant and Supervisor suffered with a communication problem. He then recommended they participate in voluntary mediation to resolve their differences. In May, 2013, both did so. (Testimony of Deputy Commissioner).

Workplace Violence

20. The Agency's workplace violence policy is policy # 1.80. This policy prohibits harassment, to include engaging in behavior that subjects another individual to extreme emotional distress. (A Exh. 7).

DETERMINATIONS AND OPINION

The General Assembly enacted the *Virginia Personnel Act, VA. Code §2.2-2900 et seq.*, establishing the procedures and policies applicable to employment within the Commonwealth. This comprehensive legislation includes procedures for hiring, promoting, compensating, discharging and training state employees. It also provides for a grievance procedure. The Act balances the need for orderly administration of state employment and personnel practices with

the preservation of the employee's ability to protect his/her rights and to pursue legitimate grievances. These dual goals reflect a valid governmental interest in, and responsibility to, its employees and workplace. *Murray v. Stokes*, 237 VA. 653, 656 (1989).

Va. Code § 2.2-3000 (A) sets forth the Commonwealth's grievance procedure and provides, in pertinent part:

It shall be the policy of the Commonwealth, as an employer, to encourage the resolution of employee problems and complaints... To the extent that such concerns cannot be resolved informally, the grievance procedure shall afford an immediate and fair method for resolution of employment disputes which may arise between state agencies and those employees who have access to the procedure under § 2.2-3001.

In disciplinary actions, the agency must show by a preponderance of evidence that the disciplinary action was warranted and appropriate under the circumstances.⁶

To establish procedures on Standards of Conduct and Performances for employees of the Commonwealth of Virginia and pursuant to § 2.2-1201 of the *Code of Virginia*, the Department of Human Resource Management promulgated Standards of Conduct Policy No. 1.60 (Policy 1.60). The Standards of Conduct provide a set of rules governing the professional and personal conduct and acceptable standards for work performance of employees. The Standards serve to establish a fair and objective process for correcting or treating unacceptable conduct or work performance, to distinguish between less serious and more serious actions of misconduct and to provide appropriate corrective action.

Under the Standards of Conduct, Group I offenses are categorized as those that are less severe in nature, but warrant formal discipline; Group II offenses are more than minor in nature or repeat offenses. Further, Group III offenses are the most severe and normally a first occurrence warrants termination unless there are mitigating circumstances. *See* Standards of Conduct Policy 1.60.

On May 12, 2014, management issued Grievant two Group II Written Notices for the reasons stated in the above section. Under one of the notices, Grievant received a suspension. Under the other, she was terminated. The Hearing Officer examines the evidence to determine if the Agency has met its burden.

I. Analysis of Issue(s) before the Hearing Officer

Issue: Whether the discipline was warranted and appropriate under the circumstances?

A. Did the employee engage in disruptive behavior, fail to follow instructions, engage in workplace violence under policy 1.80, and falsify records/reports. Further, if Grievant engaged in the behaviors did they

⁶ Grievance Procedural Manual §5.8

constitute misconduct?

1. Leader Dog Claim

The Agency contends that the report to Leader Dog was false. In response, Grievant testified that she heard Co-worker say to her service dog “I am going to beat your butt.” Moreover, she testified that on several occasions, Co-worker had spoken to her service dog in a harsh tone. Grievant is unsighted and relies on tone of voice to interpret spoken words. After hearing Co-worker’s words and the manner in which they were spoken, Grievant perceived Co-worker was mean to her dog. Having already formed this impression of Co-worker’s treatment of her service dog, Grievant became angry with Co-worker because Co-worker had obtained a ride to work deemed more desirable than Grievant’s transport to and from work. Out of this resentment, Grievant was motivated to report what she perceived as Co-worker’s ill-treatment of her service dog.

Having observed the demeanor of Grievant as she testified, the Hearing Officer finds her testimony credible. As such, the evidence is not sufficient to show Grievant made a false report. To that point, the evidence demonstrates that at the time Grievant made the report to Leader Dog, notwithstanding the motive for doing so, Grievant reasonably believed Co-worker was mean to her dog. Her belief was based on the manner in which Co-worker spoke to her dog and the specific words uttered indicating the dog would be flogged. In addition, considering Grievant’s horrific Bosnian experience, it is understandable that harsh words spoken could trigger extreme anxiety. This includes fear about the safety of others, including animals. Thus, the anxiety also served as a basis for Grievant’s belief that Co-worker was unkind to her dog.

Considering the above, the Hearing Officer finds Grievant’s perception that Co-worker was mean to her dog reasonable. Any report of same was not false regardless of what motivated Grievant to notify Leader Dog. Thus, the Hearing Officer finds the Agency has not borne its burden and shown Grievant made a false report. This is so even if subsequent to the report, Leader Dog determined no abuse had taken place.

Having made this finding the Hearing Officer did take into account the testimonies of Supervisor and HR Manager regarding the incident as well as the investigative report. The Hearing Officer is also cognizant that when Grievant made the report, Grievant resented Co-worker having a better means of getting to work than she. This emotion and motive standing alone does not render Grievant’s report false, if at the time Grievant made it she had a reasonable basis to believe Co-worker was abusing her dog. Further, the Hearing Officer notes that historically, Co-worker has been perceived as abusing her service dog. In particular, the evidence demonstrates Co-worker had previously been reported to have abused her service dog by another employee of the Agency. The Agency presented no evidence indicating this other employee was accused of making a false report and harassing Co-worker for making that report. Having carefully considered all the evidence, the Hearing Officer cannot find the Agency has met its burden and shown Grievant made a false report to Leader Dog. Likewise, no showing of harassment has been made.

2. Cat Noise Claim

The Agency also contends that Grievant falsely reported that she was harassed by Driver when he continued to make cat noises after Grievant requested he stop due to her cat's death.

The evidence shows that Grievant was saddened when her cat was put to death. Prior to this occurrence, she had encouraged Driver to greet her by mimicking the cat. Grievant testified that after the cat died, she asked Driver to stop the meowing. But it persisted. She further represents that she brought the matter to the attention of Supervisor whose only response was "he is just playing." Grievant testified that because she received no relief from the Driver continuing to make the cat sounds, she emailed Deputy Commissioner and asked for relief. The Agency asserts Driver stopped making the cat noises prior to the complaint and therefore, Grievant's report was false.

Having considered the evidence and the testimony of the witnesses and their demeanor, the Hearing Officer finds Grievant's testimony credible regarding Driver continuing to make the cat noises even after requests were made by Grievant for him to stop. Of note, while the Agency contends Driver stopped meowing before the complaint, he was not presented as a witness to substantiate that claim. Furthermore, the Agency has provided no reason explaining why he did not testify. What is more, the Agency's evidence (which Supervisor authored) corroborates Grievant's account of what occurred. Specifically, this notice indicates that when Grievant brought the offensiveness of the continued making of cat sounds to Supervisor's attention, the response as referenced above was "he is just playing." The notice goes on to assert that Grievant never expressed that she was being harassed.

While the above-referenced notice continues and asserts that Grievant never told the supervisor that she was being harassed by the cat sounds, the Hearing Officer finds it is reasonable that it would be offensive to Grievant to continue to hear the meowing when her cat had recently died. Further, once the offense was brought to Supervisor's attention an appropriate response would have been instructing the Driver to cease making the sounds. Instead the evidence demonstrates nothing was done. So Grievant engaged in a reasonable course of action and asked for relief from Supervisor's superior, the Deputy Commissioner. Of additional consideration, the evidence demonstrates that English is Grievant's second language. To that point, while Grievant may not have specifically stated the words "I am being harassed," her report to Supervisor indicating the meowing was bothersome was sufficient declaration that Grievant was being annoyed by the persistent mimicking.

Having considered the above and all evidence of record, to include the claim that Grievant never asked Driver to stop the meowing, the Hearing Officer cannot find the Agency has met its burden and shown the report to Deputy Commissioner about the cat noises was false.

3. Toy Mouse Incident

The unopposed evidence shows Grievant placed a toy mouse in the refrigerator as a joke for her supervisor. Supervisor then approached Grievant, laughed, and acknowledged the prank. She then returned the mouse to Grievant and instructed Grievant to take it home. Nonetheless, Grievant placed it back in the refrigerator. Hence, the evidence clearly establishes Grievant

failed to follow her Supervisor's instruction.

However, the Hearing Officer finds Grievant's actions regarding the toy mouse were not so severe that they constituted harassment.

4. May 6, 2014 Incident

The Agency also contends that Grievant engaged in behavior to create a negative impression of Supervisor.

The Hearing Officer had an opportunity to observe the three witnesses who were eyewitnesses to this alleged behavior. Having done so she is persuaded that Supervisor was speaking to Grievant in a stern voice. This is so because Grievant's work involving an authorization was being corrected. The corrections addressed matters for which Grievant had previously made errors and was counseled on by Supervisor on how to make those corrections. Due to Grievant's impairment and diagnosis, she experienced anxiety during the meeting, thus causing her to push away from the table and fold her arms. Accordingly, the Hearing Officer does not find the evidence sufficient to show Grievant engaged in the behavior during the meeting to create a negative impression of Supervisor. However, Grievant's comment made in the open office space within the hearing of others that she did not trust her supervisor was disrespectful.

5. Touching

The Agency asserts that Grievant made a false report when she emailed Deputy Commissioner claiming Supervisor was touching Grievant or trying to do so against Grievant's desire.

The Hearing Officer has considered that historically Grievant and Supervisor engaged in consensual touching as a way to nurture Grievant. When Grievant first started working for the Agency the touching was initiated by Supervisor as a way to support and comfort Grievant who was in a new and perhaps lonely environment. Moreover, the Hearing Officer observed the demeanor of the witnesses during the initial hearing. With certainty, Grievant testified that after Supervisor stated boundaries had to be set and there was to be no touching, Supervisor continued to touch Grievant and Grievant she. Thus, the Hearing Officer finds Grievant's account of the touching credible. This is so especially considering that incidental touching often takes place amongst employees in the work environment.

That said, the Hearing Officer is cognizant of Assistant's testimony that she had observed Grievant trying to touch Supervisor. Even so, the evidence does not establish that Assistant was always in the presence of Supervisor and Grievant. Accordingly, Assistant cannot verify that Supervisor never initialed the touching either before or after Grievant had been told boundaries needed to be established and touching was prohibited.

Thus, the Hearing Officer finds Agency cannot meet its burden and show Grievant made a false report about the Supervisor touching Grievant against her will.

The Hearing Officer also notes that Grievant did attempt to touch her supervisor once after Deputy Commissioner directed “no touching.” Grievant had asked her Supervisor if she could give Supervisor a hug because it was Supervisor’s birthday. The supervisor declined the request. Because no touching took place, the Hearing Officer finds no violation of Deputy Commissioner’s no-touch instruction.

6. Accent comment

The Agency asserts Grievant made a false report when she claimed the father in law stated that Grievant had a horrible accent. Having observed the demeanor of the Grievant as she testified, the Hearing Officer finds it reasonable that no one but Grievant would hear the father in law make the derogatory comment about Grievant’s accent. The father in law was seated directly by Grievant’s cubicle where it would have been easy to hear him. Since he made the statement under his breath, it is possible Assistant who was also close by would not have heard the father in law. Thus, the evidence is not sufficient to find Grievant made a false statement.

Having made this finding, the Hearing Officer is cognizant that Grievant hugged the father in law before leaving work. The Hearing Officer has considered the reason Grievant has offered for doing so and finds the explanation provided plausible. This is so especially considering the father-in-law is a close relative of Grievant’s Supervisor, and further the Supervisor resides with him.

7. Payne Matter

The Agency also contends that Grievant made a false report to the VR Director when she stated that Supervisor referred to Grievant as stupid.

Hearing Officer finds the evidence is insufficient to find that Grievant made a false report when she stated in an email to VR Director that Supervisor referred to Grievant as stupid and does it routinely. For one the Hearing Officer notes that the evidence shows that when Supervisor testified she was not certain what question Grievant asked Supervisor. In addition, Supervisor only speculated that the question was about presumed eligibility and if so that question could have been answered by resources in the regional office. Moreover, Grievant testified credibly that because she is blind, she relies heavily on the tone of a voice to interpret the meaning of words spoken. She testified that Supervisor has repeatedly informed Grievant that her perspective is “way off” and uses a tone of voice that denotes displeasure and insights anxiety in Grievant. Considering this evidence and the fact that English is Grievant’s second language, the Hearing Officer finds it reasonable that Grievant perceived Supervisor often refers to Grievant as being stupid. Accordingly, the Hearing Officer finds the Agency has not met its burden and shown Grievant made false reports when she reported that Supervisor often refers to her as stupid.

Hearing Officer does note that Supervisor contends she was not angry with Grievant when she instructed her to check within the office first. However, the Hearing officer finds that this does not mean Grievant did not have a legitimate reason to perceive Supervisor was angry

considering Grievant's blindness and the likelihood that Supervisor's instruction to Grievant was given in more than a laidback manner.

8. Father in Law Abuse to Cat

The Agency alleges that Grievant's calls to Animal Control about the father in law abusing the cat were false. "False reporting" entails making representations that are known to be untrue. It indicates that at the time a matter is conveyed, the provider of the information knows it to be incorrect. Consequently, in order for the reports to have been false, at the time they were made, Grievant must have known there was no abuse or no grounds to suspect abuse when she placed the calls. The evidence does not support this. It demonstrates Grievant is a cat lover. She has adopted two cats from the SPCA. She mourned the death of one of her cats. When she heard meowing sounds in the office after her cat was "put down," Grievant cried.

Also, the evidence shows that Supervisor on several occasions discussed her father in law in the office; that is, his angry outbursts after suffering a stroke, his meanness, securing the cat in the laundry room, his hitting the cat. Considering these reports by the Supervisor, the Hearing Officer finds it reasonable for one to suspect the father in law abused the cat.

In addition, the evidence demonstrates Grievant's admiration for cats. She adopted two from the SPCA and mourned when one of them had to be "put down." She cried in the office when other staff mimicked cat noise after death of her cat. Hence, with such love for cats, the Hearing Officer finds Grievant's perception that the father in law mistreated the cat reasonable. And further, any ensuing calls to Animal Control were not false reports because at the time the calls were placed, Grievant had a reason to believe the cat was being abused. This is so also even if the reason Grievant made the calls was because she was angry with her supervisor. So long as the calls were made with a reasonable belief that what was reported was accurate, there was no false report at the time they were made.

The Agency also contends that Grievant pretended to be Supervisor when she made the calls on April 24 and 25, and thus engaged in unethical conduct. The Hearing Officer has considered the testimony of Grievant denying that she represented herself as Supervisor. She has also viewed the reported information in the investigative report regarding the Animal control report and any related emails. Regarding the investigative report, very little weight has been given to the second and third hand statements of Sergeant. Having conducted a thorough review of the evidence, the Hearing Officer finds insufficient evidence to find Grievant represented herself as Supervisor.

That said the Hearing Officer does not condone how Grievant managed her anger with Supervisor in this case nor the emails sent to Supervisor on April 24, 2014, and April 29, 2014. However considering the evidence in its totality, the Hearing Officer finds the Agency is unable to meet its burden and show (i) a false report was made and (ii) Grievant represented she was Supervisor when she made the calls.

Summary

In sum with respect to the Agency's claims of misconduct, the Hearing Officer finds based on the evidence and for reasons stated here that the Agency has failed to show Grievant made any false reports or harassed her co-workers and Supervisor.

In contrast, the Hearing Officer finds based on the evidence Grievant was disrespectful to her supervisor after the May 6, 2014 meeting by commenting in the hearing of others that Supervisor could not be trusted. Further, Grievant failed to follow Supervisor's instruction regarding the toy mouse.

Moreover, Grievant objected to the second and in some instances third hand statements in the investigative report. Having considered the evidence in its totality, the Hearing Officer has not given this report great weight.

B. Was the discipline consistent with policy and law?

Having found Grievant was disrespectful and failed to follow instructions, the Hearing Officer now determines if the discipline, the issuance of the Group II Written Notice with suspension was appropriate. The Standards of Conduct indicates that failing to follow policy or instructions is a group II offense. The evidence shows Grievant committed this offense. Grievant was disrespectful to the Supervisor. This conduct was similar to previous conduct for which Grievant had been disciplined. Hence, under Policy 1.60 a group II written notice is appropriate discipline as the offense was repeated. Moreover, under this policy, for the first Group II written notice, the Agency may suspend Grievant for up to 10 days. The Agency issued Grievant such a suspension in this case. Accordingly, the Hearing Officer finds the discipline for the Group II Notice with suspension consistent with policy.

Because the evidence failed to establish Grievant engaged in the conduct cited in the second group notice – harassment and false reports – it is not consistent with policy and law.

II. Mitigation

Under statute, hearing officers have the power and duty to “[r]eceive and consider evidence in mitigation or aggravation of any offense charged by an agency in accordance with the rules established by the Office of Employment Dispute Resolution [“EDR”].”⁷ EDR's *Rules for Conducting Grievance Hearings* provides that “a hearing officer is not a super-personnel officer” therefore, “in providing any remedy, the hearing officer should give the appropriate level of deference to actions by agency management that are found to be consistent with law and policy.”⁸ More specifically, the *Rules* provide that in disciplinary, grievances, if the hearing officer finds that;

- (i) the employee engaged in the behavior described in the Written Notice.
- (ii) the behavior constituted misconduct, and

⁷ Va. Code § 2.2-3005 and (C)(6)

⁸ *Rules for Conducting Grievance Hearings* VI(A)

- (iii) the agency's discipline was consistent with law and policy, the agency's discipline must be upheld and may not be mitigated, unless, under the record evidence, the discipline exceeds the limits of reasonableness.⁹

Thus, the issue of mitigation is only reached by a hearing officer if he or she first makes the three findings listed above. Further, if those findings are made, a hearing officer must uphold the discipline if it is within the limits of reasonableness.

Because reasonable persons may disagree over whether or to what extent discipline should be mitigated, a hearing officer may not simply substitute his or her judgment on that issue for that of agency management. Indeed, the “exceeds the limits of reasonableness” standard is a high standard to meet, and has been described in analogous Merit Systems Protection Board case law as one prohibiting interference with management's discretion unless under the facts the discipline imposed is viewed as unconscionable disproportionate, abusive, or totally unwarranted.¹⁰

The Hearing Officer has found that Grievant engaged in the conduct described in the group notice that suspended her, the behavior was misconduct, and the Agency’s discipline was consistent with policy and law.

Next, the Hearing Officer considers whether the discipline was unreasonable and therefore should be mitigated. To advance her claim of mitigation, Grievant claims retaliation, hostile work environment. She also asserts that English is her second language and she does not always accurately translate the meaning of words. In addition Grievant makes notes of her evaluations that rate her as a contributor. Having considered these claims and all evidence of record, the Hearing Officer does not find the group II written notice with a suspension unreasonable.

III. Attorney Fees

Under Virginia Code § 2.2 – 3005.1 (A), “[i]n grievances challenging discharge, if the hearing officer finds that the employee has substantially prevailed on the merits of the grievance, the employee shall be entitled to recover reasonable attorney’s fees, unless special circumstances would make an award unjust.” Grievant has substantially prevailed on the merits of the grievance because she is to be reinstated as set forth below in the decision section. There are no special circumstances making an award of attorney’s fees unjust. Accordingly Grievant's attorney is advised to submit an attorney's fee petition to the Hearing Officer within 15 days of this decision. The petition should be in accordance with the *Grievance Procedural Manual* §7.2(e).

⁹ *Rules for Conducting Grievance Hearings* VI(B). The Merit Systems Protection Board’s approach to mitigation, while not binding on EDR, can be persuasive and instructive, serving as a model for EDR hearing officers. *E.g.*, EDR Ruling No. 2012-3102; EDR Ruling No. 2012-3040; EDR Ruling No. 2011-2992 (and authorities cited therein).

¹⁰ *E.g., id.*

DECISION AND ORDER

After a thorough consideration of all the evidence, whether specifically mentioned or not, and based on her findings here, the Hearing Officer's decision is set forth here.

1. Group II Written Notice with Suspension - Upheld

The Hearing Officer finds based on the evidence Grievant was disrespectful to her supervisor on May 6, 2014. Further, Grievant failed to follow Supervisor's instruction regarding the toy mouse. Hence, for the reasons stated here, the Hearing Officer upholds the Agency's discipline only with respect to the Group II Written Notice that suspended Grievant from May 13, 2014, to May 27, 2014.

2. Group II Written Notice with Removal - Rescinded

In contrast, with respect to the Agency's Group II Written Notice with removal, based on the evidence of record the Hearing Officer finds the Agency has not met its burden. Therefore, the Group II Written Notice with termination is rescinded. Moreover, the Agency is ordered to take the following action:

1. rescind the Group II Written Notice with termination;
2. pay full back pay for the period Grievant has been separated from her job excluding the 10 days of suspension without pay (back pay is to be offset by interim earnings);
3. appropriately restore other benefits and seniority;
4. reinstate Grievant to her former position or, if occupied, to an equivalent position.

APPEAL RIGHTS

You may file an **administrative review** request within **15 calendar days** from the date the decision was issued, if any of the following apply:

1. If you believe the hearing decision is inconsistent with state policy or agency policy, you may request the Director of the Department of Human Resource Management to review the decision. You must state the specific policy and explain why you believe the decision is inconsistent with that policy. Please address your request to:

Director
Departmental of Human Resource Management
101 N. 14th St., 12th Floor
Richmond, VA 23219

or, send by fax to (804) 371 – 7401, or e-mail.

2. If you believe that the hearing decision does not comply with the grievance procedure or if you have new evidence that could not have been discovered before the hearing, you may request that EDR review the decision. You must state the specific portion of the grievance procedure with which you believe the decision does not comply. Please address your request to:

Office of Employment Dispute Resolution
Department of Human Resource Management
101 N. 14th St., 12th Floor
Richmond, VA 23219

or, send by e-mail to EDR@dhrm.virginia.gov. or by fax to (804) 786-1606.

You may request more than one type of review. Your request must be in writing and must be **received** by the reviewer within 15 calendar days of the date the decision was issued. You must provide a copy of all of your appeals to the other party, EDR, and the hearing officer. The hearing officer's **decision becomes final** when the 15 calendar day period has expired, or when requests for administrative review have been decided.

You may request a judicial review if you believe the decision is contradictory to law. You must file a notice of appeal with the clerk of the Circuit Court in the jurisdiction in which the grievance arose within **30 days** of the date when the decision becomes final.¹¹

Entered this 25th day of August, 2014.

Ternon Galloway Lee, Hearing Officer

cc: Agency Advocate
Agency Representative
Grievant's Advocate
Grievant
EDR's Director

¹¹ Agencies must request and receive prior approval from EDR before filing a notice of appeal.

DECISION OF HEARING OFFICER
In the matter of
Case Number: 10385
Hearing Date: July 17, 2014
Decision Issued: August 25, 2014
Addendum to Decision Issued: September 22, 2014

ADDENDUM TO DECISION

In her decision issued August 25, 2014, the Hearing Officer found the Grievant engaged in disrespectful behavior and failed to follow her supervisor's instruction. The Hearing Officer then upheld the Group II Written Notice with a suspension. However, the Hearing Officer found the Agency failed to meet its burden and show Grievant falsified a report and engaged in harassing behavior. Hence, the Hearing Officer rescinded the other Group II Written Notice with removal.

The Hearing Officer also noted that the grievance statute provides that for those issues qualified for a hearing, the Hearing Officer may order relief including reasonable attorneys' fees in grievances challenging discharge if the Hearing Officer finds that the employee "substantially prevailed" on the merits of the grievance, unless special circumstances would make an award unjust.¹² The Hearing Officer determined that Grievant substantially prevailed on the merits of the grievance because she was reinstated and an award of attorney fees would not be unjust.

Grievant's attorney timely submitted a petition for attorney fees. In that petition, Counsel for Grievant requests payment for 25 hours and 35 minutes of legal work performed by the attorney and 1 hour and 15 minutes of paralegal work. The Agency has objected to the payment of attorney fees during the period May 10, 2014, to May 11, 2014 (7.25 hours) and August 1, 2014 (3.75 hours).¹³

First, the Agency asserts that prior to May 12, 2014, Grievant had not been issued any group notice with termination and therefore no attorney fees are permissible for the services rendered prior to Grievant's discharge. The applicable provision of the Grievance Procedure Manual (GPM) is § 7.2(e). In pertinent part, it provides the following:

Attorneys' fees are not available **under the grievance procedure**, with one exception: an employee who is represented by an attorney licensed by the Virginia State Bar, and who financially prevails on the merits of the grievance challenging his/her discharge is entitled to recover reasonable attorneys' fees, unless special circumstances would make an award unjust. (emphasis added).

Moreover, a review of the applicable provisions of the GPM and the reasonable interpretation of them indicate that the grievance process cannot begin until the employee is issued a group notice with removal. Further, while attorney fees may be awarded, the grant of such fees must be for legal representation during the grievance process.

¹² Va. Code § 2.2-3005.1A.

¹³ The Petition with its attachments is appended here as Attachment 1.

In this case the Agency issued Grievant a group notice with removal on May 12, 2014. Accordingly, the Hearing Officer finds that under the GPM § 7.2, she does not have the authority to award attorney fees prior to May 12, 2014.

Second, the Agency argues that attorney fees are not permitted for work performed by the attorney from July 26, 2014, to August 1, 2014. The Agency asserts that the legal work itemized on the attorney bill relates to the supplemental hearing. It further states, Grievant's attorney did not participate in that hearing. The Hearing Officer has reviewed the itemized time sheet for the July/August time period and finds the attorney services and time were reasonable. Further, there was no billing by the attorney for representing Grievant at the reopened hearing.

Finally, the Hearing Officer notes that the GPM only permits her to award attorney fees. Accordingly, because no authority has been granted to permit paralegal fees, those listed on the timesheet are denied.

The Hearing Officer has considered the time and effort expended by the attorney(s), the nature of the services rendered, the complexity of the services, the value of the services to the client, the results obtained, whether the fees incurred were consistent with those generally charged for similar services, and whether the services were necessary and appropriate. She has also reviewed the Agency's objections as noted above. Having done so, the Hearing Officer finds Grievant's attorney expended 18.33 hours in representing her client during the grievance process. Further, she finds that an hourly rate of \$131.00 is reasonable.¹⁴ Hence, the Hearing Officer approves \$2,401.73 in attorney fees; that is 18.33 attorney hours x \$131.00 = \$2,401.23.

Within 10 calendar days either party may petition EDR for a decision solely addressing whether the fee addendum complies with the Manual and the Rules for Conducting Grievance Hearings.

Entered this 22nd day of September, 2014.

Ternon Galloway Lee, Hearing Officer
cc: Agency Advocate; Grievant's Advocate
EDR's Director of Hearings Program

¹⁴ This is the maximum hourly amount permitted under the Rules for Conducting Grievance Hearings, Section VI (E) and pursuant to EDR website regarding the allowance of Attorney fees.